Supreme Court, U.S.
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No. 93-18

In The

Supreme Court of the United States

October Term, 1993

LELAND AND KARLA SWENSON,

Petitioners,

v.

OGLALA SIOUX TRIBE,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

RESPONDENT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. SUPREME COURT RULES PROHIBIT PETITIONERS FROM CHALLENGING THE CONSTITUTIONALITY OF THE ICWA AT THIS LATE STAGE IN THE PROCEEDINGS 1

II. PETITIONERS' BELATED CONSTITUTIONAL CHALLENGE IS BASED ON THE FALSE ASSERTION THAT THE CHILD WAS NOT SHOWN TO BE ELIGIBLE FOR MEMBERSHIP IN THE TRIBE AT THE TIME OF THE CUSTODY PROCEEDINGS 3

III. APPLICATION OF THE ICWA IN THIS CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE CONSTITUTION 5

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Application of Angus, 655 P.2d 208 (Or. App. 1982), *cert. denied sub. nom. Woodruff v. Angus*, 464 U.S. 830 (1983) 6

In Interest of Armell, 550 N.E. 2d 1060 (Ill. App. 1 Dist.), *cert. denied sub. nom. Armell v. Prairie Band of Potawatomi Indians*, ___ U.S. ___, 112 L.Ed.2d 310 (1990) 6

In re Appeal in Pima County Juvenile Action, 635 P.2d 187 (Ariz. App. 1981), *cert. denied sub. nom. Catholic Social Servs. v. P.C.*, 455 U.S. 1007 (1982) 6

In re Baby Girl A., 282 Cal. Rptr. 105 (Cal. App. 4 Dist. 1991) 7

In re Guardianship of D.L.L. & C.L.L., 291 N.W.2d 278 (S.D. 1980) 6

Morton v. Mancari, 417 U.S. 535 (1974) 7

Sizemore v. Brady, 235 U.S. 441 (1914) 8

State ex rel Children's Services Div. v. Graves, 848 P.2d 133 (Or. App. 1993) 7

Stephens v. Cherokee Nation, 174 U.S. 445 (1899) 7

United States v. Antelope, 430 U.S. 641 (1977) 8

United States v. Rogers, 4 How. 567 (1846) 8

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

H.R. Rep. No. 95-1386 (1978), at 12-18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530 7

Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 *et seq* ..... *passim*

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ARGUMENT

I. SUPREME COURT RULES PROHIBIT PETITIONERS FROM CHALLENGING THE CONSTITUTIONALITY OF THE ICWA AT THIS LATE STAGE IN THE PROCEEDINGS.

Petitioners raise the issue of the constitutionality of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 *et seq.*, for the first time in Petitioners' Reply Brief. This issue of constitutionality was not addressed by the trial court, nor by the district court, nor by the Idaho Supreme Court, nor by the Petition for Certiorari, nor even by Respondent's Brief in Opposition.

Raising this issue at this late stage of the proceedings is highly inappropriate and adds nothing to Petitioners' case. The Rules of the Supreme Court provide that only the questions set forth in the petition, or fairly included therein, will be considered by the Court. Rule 14.1.(a). The Petitioners are required to set forth the stage in the proceedings at trial and appellate courts where a federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a Writ of Certiorari. Rule 14.1.(h).

A Reply Brief may address only those arguments first raised in the Brief in Opposition. Rule 15.6. Although Petitioners strain to find that Respondents urge an overly broad application of the Act, the facts do not support Petitioners' hyperbole. Petitioners claim that "Respondent essentially takes the position that all that needs to be present is a possible genetic connection to the Indian race." (Pet'r Reply Br. 1.) Of course, Respondents have taken no such position, asserting only that the Act by its own terms applies to a child who is eligible for membership in an Indian tribe. (Resp't Br. Opp. 8-16).

Thus, Petitioners' belated attempt to construct and destroy a straw man must fail. There is much more to this case than a "possible genetic connection to the Indian race." The evidence before the trial court conclusively established the child's eligibility for enrollment. (10 a).

Petitioners' belated challenge to the constitutionality of the ICWA is nothing more than a desperate attempt to prolong these custody proceedings in hopes of increasing their chances of retaining physical custody of the child on a permanent basis. Indeed, Petitioners have asked the

trial court, on remand, to stay further custody proceedings pending resolution by this Court of the Petition for Certiorari. Respondents pray the Court will swiftly reject Petitioners' Reply Brief and deny the Petition for Certiorari.

II. PETITIONERS' BELATED CONSTITUTIONAL CHALLENGE IS BASED ON THE FALSE ASSERTION THAT THE CHILD WAS NOT SHOWN TO BE ELIGIBLE FOR MEMBERSHIP IN THE TRIBE AT THE TIME OF THE CUSTODY PROCEEDINGS.

Petitioners do not argue that the Act is unconstitutional as applied to a child who is eligible for membership. Rather, Petitioners assert that the Act may not be applied to Indians merely on the basis of "a possible genetic connection to the Indian race." (Pet'r Reply Br. 1.)

Petitioners assert that "Tribes may not interfere with the custody of children who are not tribal members or are not shown to be eligible to become tribal members at the time the adoption or termination proceedings take place." (Pet'r Reply Br. 4.)

Petitioners charge that the "child in this case was not claimed as eligible for membership by the Oglala Sioux Tribe at the time the custody proceedings took place." (Pet'r Reply Br. 2.) Traveling down the same mistaken path, Petitioners falsely proclaim that "it was not established at trial that the child was eligible to become a tribal member." (*Id.* at 4.)

Obviously, the Tribe's very intervention was premised upon its claim that the child was eligible for membership. Indeed, even the trial court initially acknowledged the "determination by the tribe that the child was eligible for membership in the tribe." (3a.)

Unfortunately, Petitioners and the trial court alike since have confused "eligibility for membership" with the administrative function of "enrollment." However, Petitioners no longer have any excuse for such confusion, since the Idaho Supreme Court distinguished the two and found that the evidence at trial conclusively established the child's eligibility for membership. The Idaho Supreme Court stated:

> In this case, the evidence presented to the trial court established the applicability of ICWA. The evidence contained the tribe's requirements for "enrollment." Although enrollment and membership are not synonymous, eligibility for enrollment is evidence that the requirements for membership are met. 44 Fed. Reg. 67,584, 67,586 (enrollment is a common but not exclusive evidentiary means of determining membership in a tribe). Enrollment is an administrative function. The core of the inquiry under ICWA is eligibility for membership in the parent's tribe. The affidavit of the enrollment director explains the only reason the tribe could not make a conclusive determination regarding the child's eligibility for enrollment was because the application was missing documentary evidence regarding paternity in the form of a birth certificate or paternity affidavit. The trial court, however, found that the father is one of the child's parents. This finding, together with the father's

> ownership of land on the reservation, establishes the child's eligibility for membership in the tribe. The other requirements for enrollment go to the administrative aspect of enrollment and are not requirements of eligibility for tribal membership.

(10a-11a.)

III. APPLICATION OF THE ICWA IN THIS CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

No court has held that the ICWA is unconstitutional; indeed every court presented with the question has affirmed the constitutionality of the Act.

The Appellate Court of Illinois held that the ICWA does not violate the constitution, stating that:

> Federal legislation with respect to Indian tribes is not based upon impermissible racial classifications, but derives from the special status of Indians as members of a quasi-sovereign tribal entities. (Citations omitted.) Moreover, the Commerce Clause (U.S. Const. art. I, § 8), gives Congress plenary power to regulate Indians on or off a reservation and provided the congressional authority for enactment of the ICWA. (Citations omitted.)
>
> Furthermore, when laws which grant special treatment to Indians are rationally related to the fulfillment of Congress' unique obligation toward Indians, those legislative judgments will not be disturbed. (Citations omitted.) The provisions of ICWA were deemed by Congress to be essential for the protection of Indian culture and

> to assure the very existence of Indian tribes. Those provisions do not contravene equal protection. (Citation omitted.)
>
> Regarding the . . . contention that the ICWA lacks a rational basis, we conclude that the protection of the integrity of Indian families is a permissible goal that is rationally tied to the fulfillment of Congress' unique guardianship obligation toward Indians. (Citations omitted.)

In Interest of Armell, 550 N.E. 2d 1060, at 1067-68 (Ill. App. 1 Dist.), *cert. denied sub. nom. Armell v. Prairie Band of Potawatomi Indians*, ___ U.S. ___, 112 L.Ed.2d 310 (1990). Eleanor Armell, a 3-1/2 year old child, was eligible for membership but not enrolled in the Potawatomi tribe at the time she was placed into a foster home by the state court. She had never lived on a reservation and had no contacts with the tribe. *Id.* at 1062. The Appellate Court held, nonetheless, that even after four years in a foster home, transfer of jurisdiction to the tribal court was necessary and appropriate under the ICWA. *Id.* at 1065.

Other cases upholding the constitutionality of the Act include *In re Guardianship of D.L.L. & C.L.L.*, 291 N.W.2d 278, 282 (S.D. 1980), wherein the Supreme Court of South Dakota held Indian children were not denied due process or equal protection by exclusive tribal jurisdiction. In *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 193 (Ariz. App. 1981), *cert. denied sub. nom. Catholic Social Servs. v. P.C.*, 455 U.S. 1007 (1982), the Court of Appeals of Arizona reached the same conclusion. The Court of Appeals of Oregon, in *Application of Angus*, 655 P.2d 208, 213 (Or. App. 1982), *cert. denied sub. nom. Woodruff v. Angus*, 464 U.S. 830 (1983), held that the application of

ICWA provisions governing parental consent to adoptive placements did not violate the Fifth Amendment. The Court of Appeals of Oregon more recently held that different standards of proof for termination of parental rights of Indians and non-Indians does not constitute a violation of equal protection. *State ex rel Children's Services Div. v. Graves*, 848 P.2d 133 (Or. App. 1993). The California Court of Appeals ruled that the ICWA is not unconstitutional in placing further restrictions on a mother's choice of where her child could be placed. *In re Baby Girl A.*, 282 Cal. Rptr. 105, 110 (Cal. App. 4 Dist. 1991).

The legislative history to the ICWA includes extensive discussion of the foundations of Congressional power to legislate in the area of child custody proceedings and specifically with respect to Indian tribes and Indian children. H.R. Rep. No. 95-1386 (1978), at 12-18, *reprinted in* 1978 U.S. Code Cong. & Admin. News 7530. Congress rejected the suggestion that the ICWA violated constitutional restraints in any manner.

The legislative history specifically addresses the question of individuals not formally enrolled as members of an Indian tribe. The legislative history notes that the Supreme Court upheld the constitutionality of the congressionally-mandated Indian hiring preference in the Bureau of Indian Affairs, although the preference explicitly extends to non-member Indians. *Id.* at 16, *citing Morton v. Mancari*, 417 U.S. 535 (1974). The legislative history cites other case law establishing that Congress may define "Indian" without regard to tribal enrollment laws, for purposes of federal statutes and jurisdiction. *Id., citing Stephens v. Cherokee Nation*, 174 U.S. 445 (1899) (Congress may disregard existing membership rolls and direct that

per capita payments be made upon the basis of a new roll); *Sizemore v. Brady*, 235 U.S. 441 (1914) (Congress may determine tribal membership); *United States v. Rogers*, 4 How. 567 (1846) (Congress may disregard tribal membership criteria and determine for itself whether a person is an Indian for purposes of a federal criminal statute); *United States v. Antelope*, 430 U.S. 641, 646 n. 7 (1977) ("It should be noted, however, that enrollment in an official tribe has ~~not been held~~ to be an absolute requirement for federal jurisdiction.")

The legislative history concludes:

> If the courts have found that Congress has the power to act with respect to nonenrolled Indians in the foregoing kinds of circumstances, how much more is its power to act to protect the valuable rights of a minor Indian who is eligible for enrollment in a tribe? This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority,

> cannot make a reasoned decision about their tribal and Indian identity.

Id. at 16-17.

CONCLUSION

Petitioners' belated attack on the constitutionality of the ICWA is not allowable under Supreme Court rules. Petitioners have distorted the record in a vain attempt to provide some factual basis for their erroneous claim that the child was not shown to be enrollable at trial. The ICWA is a constitutionally permissible exercise of plenary congressional authority regarding Indian affairs.

Respondent prays the Court will disregard Petitioners' Reply Brief and summarily deny the petition for certiorari.

Respectfully submitted,

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